JOSEPH ALSTAD

IBLA 75-10 Decided March 4, 1975

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest against approval of assignment of oil and gas lease Great Falls 051995-C.

Set aside and remanded.

1. Oil and Gas Leases: Assignments or Transfers -- Rules of Practice: Appeals: Failure to Appeal -- Rules of Practice: Protests

   The assignor of an oil and gas lease is not barred from protesting against a decision approving the assignment because of his failure to appeal from an earlier decision denying the assignee's request for assignment approval but stating that approval would be permitted upon performance of certain conditions.

2. Oil and Gas Leases: Assignments or Transfers -- Administrative Authority: Generally

   The failure by an oil and gas lease assignee to timely file the requisite bond as required by an initial State Office decision cannot be relied upon by the assignor as a basis for protesting a subsequent decision which reconsiders and grants a request for assignment approval, for it is the Department alone which may assert such default as a basis for denying a subsequent assignment approval request.

3. Oil and Gas Leases: Assignments or Transfers -- Oil and Gas Leases: Renewals -- Rules of Practice: Protests

When an assignment of an oil and gas lease, made prior to lease renewal, has been approved after renewal and thereafter it appears that there is a controversy whether the parties contemplated that the assignment of the base lease would extend to the renewal lease, the Department will not take action on a protest requesting rescission of the assignment approval, but will maintain the status quo for a period sufficient to permit the parties to institute litigation or take other action to resolve their dispute.

APPEARANCES: John F. Bayuk, Esq., Donovan and Bayuk, Shelby, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Joseph Alstad has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated June 3, 1974, dismissing his protest against the approval of an assignment of oil and gas lease Great Falls 051995-C in favor of Anna Alstad.

The circumstances leading up to this appeal are as follows. On October 6, 1936, the General Land Office [now Bureau of Land Management] issued oil and gas lease Great Falls 051995-(b) to one of appellant's predecessors in interest for a period of 20 years with the preferential right to renew the lease for successive periods of 10 years, upon such reasonable terms and conditions as prescribed by the lessor, unless otherwise provided by law at the time of expiration of such periods. On August 11, 1953, the BLM approved a partial assignment of the lease to appellant's assignor, creating a separate lease; the partial interest was designated as Great Falls 051995-C. Drilling restrictions under the lease resulted in an extension of the original term beyond 20 years, with expiration to occur on December 6, 1961. The lease was renewed for a 10-year term expiring on November 30, 1971. Thereafter, appellant became the approved assignee of lease 051995-C, effective as of June 1, 1965.

By letter dated June 20, 1970, appellant informed the BLM that his ex-wife, Anna Alstad, had been awarded the lease as part of a property settlement agreement executed pursuant to a divorce decree. Appellant advised the BLM to contact Mrs. Alstad and request a substitute $5,000 bond or cancel the lease. By letter dated June 25, 1970, the BLM contacted Anna Alstad and requested that she file assignment instruments or a copy of a court order transferring the lease interest without benefit of assignment. In addition, the BLM informed her that either a new bond or a consent of surety for a change in the name of the principal on the existing bond had to be submitted.

On January 6, 1971, Mrs. Alstad submitted a renewal lease application, together with a check for $10. Accompanying the application was a court decree, dated June 19, 1969, awarding Anna Alstad certain properties, among which was "Item 14 Cardinal Lease;" she also submitted a copy of an assignment, dated April 22, 1970, executed by appellant in favor of Anna Alstad, conveying an undivided one-half interest in oil and gas lease 051995-C. An office memorandum in the case file, dated June 21, 1971, indicates that the State Office contacted Anna Alstad's attorney, Robert L. Johnson, to ascertain whether anything was being done to furnish information necessary to process the assignment approval. The State Office was advised that Mrs. Alstad was searching for an outstanding earlier assignment for the remaining one-half interest in the lease which was executed in her favor by appellant. Mr. Johnson stated that he would attempt to submit the additional assignment prior to the time that renewal was due, and would also send a consent of surety.

By letter dated August 16, 1971, the BLM informed Mr. Johnson that it had no authority to transfer the entire lease interest in favor of Anna Alstad without proper evidence to support such action. 1/ In the absence of certified copies of the outstanding assignment of the undivided one-half interest in the lease, the only action that could be taken, upon request, would be recognition of a partial assignment based upon the April 22, 1970, assignment instrument.

1/ Anna Alstad maintained that the "Cardinal Lease," granted to her pursuant to the court decree, represented oil and gas lease 051995-C. The decree, however, did not provide a physical or numerical description of the property. Furthermore, the assignment executed pursuant to the decree conveyed only an undivided one-half interest in the lease. Accordingly, the BLM properly concluded that it could not approve an assignment of the entire leasehold without further evidence supporting ownership of the entire estate.

On November 1, 1971, the BLM wrote to appellant informing him that the term for the existing 10-year renewal lease would expire on November 30, 1971, absent an application for another renewal, and as lessee of record, he was the only party qualified to apply for a renewal lease. 2/ The BLM enclosed a copy of its August 16, 1971, letter to Anna Alstad's attorney in order to explain the reason why it had been unable to process any transfer of the interests under the lease.

On November 26, 1971, appellant filed an application for renewal of the lease. On November 30, 1971, Anna Alstad's attorney submitted a letter requesting that the State Office accept it as an application for renewal of the subject lease. Accompanying the letter was a copy of an assignment of the outstanding one-half interest in the lease executed by appellant to Anna Alstad, dated April 20, 1964. By letter decision issued to Anna Alstad, dated December 9, 1971, the State Office stated, in part, the following:

> As of November 30, 1971, Robert L. Johnson, * * * filed in this office a machine copy of an ASSIGNMENT, executed by Joseph Alstad as of April 20, 1964, in which an undivided one-half (1/2) interest in and to leasehold interests under Federal oil and gas lease GREAT FALLS 051995-C was transferred in your favor. The accompanying letter also requested that we accept it as an application for renewal of the subject lease.
>
> A proper application for renewal of this lease was filed in this office by Joseph Alstad as of November 26, 1971. * * *
>
> The following requirements must be met by you to comply with the rules and regulations for transfer of said lease interests:
>
> (1) Submission of a corporate surety bond in the sum of $5,000.00, * * *.
>
> (2) Three (3) certified copies of the Assignment executed April 20, 1964, transferring a one-half interest.
>
> (3) Two (2) additional certified copies of Assignment of one-half interest filed January 6, 1971.

2/ See Glen E. Petters, A-26265 (May 27, 1952); cf. Clarence Zuspann, 18 IBLA 1 (1974).

> The renewal lease must necessarily carry an effective date of issuance of December 1, 1971. Therefore, the renewal application which is on file may be honored and issued in the name of Joseph Alstad. Dependent upon the date of receipt of the evidence required from you, a transfer can be processed in accordance with the Court Decision and the certified copies of assignments to convey the lease interests to you at a later date. No assignments of a producing lease may be processed and approved without applicable bonding coverage to take over the lease liabilities. * * *
>
> * * * * * * *
>
> A period of thirty (30) days from receipt of this Decision is allowed in which to meet the requirements made herein, or request an extension of time by letter in which you agree that compliance will be made.
>
> Absent compliance or adverse action, this Decision will become final within the time allowed and all action will be closed on this transfer without further notice from this office.
>
> The right of appeal to the Board of Land Appeals, Office of Hearings and Appeals, is allowed in accordance with 43 CFR Part 4. * * *

Copies of the decision were sent to appellant and his counsel.

In response to a request for additional time to comply with all assignment requirements, the BLM, in a letter dated January 24, 1972, granted Anna Alstad an extension through April 27, 1972. A copy of the letter was sent to appellant and his counsel. On April 27, 1972, following another request for an extension due to inability to furnish a bond, the BLM granted an additional extension, through July 31, 1972, again with a copy of the letter transmitted to appellant.

On April 21, 1972, the BLM forwarded to appellant renewal lease forms for signature and return. The original forms were lost in the mail, and by letter dated June 9, 1972, appellant requested additional forms with the following comment: "[Y]ou can send me other forms and will sign and return, altho as you know lease has no useful purpose for me at the present time * * *." New forms were submitted by appellant and on June 16, 1972, the BLM informed him that a new 10-year renewal lease had been approved and issued effective from December 1, 1971.

On July 28, 1972, Anna Alstad's attorney transmitted to the BLM the required assignment documents. In a letter accompanying the documents, he indicated that Mrs. Alstad was still unable to secure the requisite bond due to pending litigation between herself and a number of parties, one of whom was appellant. On April 30, 1974, the BLM received from Anna Alstad a $5,000 cash bond, and a request for approval of the assignment. By two decisions, dated May 13, 1974, the BLM accepted the bond, and approved the assignment of the leasehold interest effective as of May 1, 1974, respectively.

By letter dated May 16, 1974, appellant protested the approval of the assignment urging that the court-ordered settlement applied only to the lease existing during the 1961-1971 term, and not to the renewal lease issued to appellant, effective December 1, 1971. Appellant argued that all rights that may have existed in Anna Alstad ended with the termination of the old lease. Appellant then urged that any remaining controversy should be resolved by the parties, inter se.

By its decision of June 3, 1974, the State Office dismissed appellant's protest for the following reasons:

> Our Decision dated December 9, 1971, denying Request for Approval of Transfer of Entire Leasehold Interests in favor of Anna Alstad, states the requirements to be met to gain such approval. A part of that Decision stated that the renewal application which was filed would be honored and the renewal lease issued in the name of Joseph Alstad, and went on to explain how the transfer of the leasehold interests would be accomplished after the lease was renewed. A copy of that Decision was directed to you and one to your attorney by certified mail. The right of appeal was allowed. No appeals were filed.
>
> The 90-day extension of time to that Decision was granted, by notice of January 24, 1972, and again certified copies of that Notice were directed to you and your attorney. No protest to such action was filed. This put you on notice again that official documents were on file in this office in which the interests under this lease were being considered for transfer in accordance with District Court Order No. 9723, dated June 19, 1969.
>
> For the reasons presented herein, your Protest concerning this matter is hereby dismissed and approval of this ASSIGNMENT, effective as of May 1, 1974, will stand as issued.

On appeal, Mr. Alstad argues that: (1) the decision appealed from is erroneous as it made it incumbent upon Joseph Alstad to appeal from the December 9, 1971, decision issued to Anna Alstad, denying her request for assignment approval; (2) as no appeal was taken from the December 9, 1971, decision by Anna Alstad, the decision denying approval became final following her failure to comply with the requirements for approval prior to the expiration of the successive extensions; and (3) any rights that may have existed in Anna Alstad terminated upon the expiration of the old lease.

[1] With respect to appellant's first point on appeal, we agree that the decision below improperly dismissed appellant's protest. Appellant cannot be barred from protesting against the State Office's May 13, 1974, decision approving the assignment, based upon his failure to appeal from the December 9, 1971, decision issued to Anna Alstad, denying her request for assignment approval. Appellant was admittedly put on notice that the State Office conditionally intended to approve Anna Alstad's assignment provided she submitted the required bond and documentation. We do not believe, however, that by failing to object to conditionally intended action, appellant waived his right to protest against a subsequent final decision which approved the assignment. Cf. Carl Wittman, 16 IBLA 188, 189 (1974); Duncan Miller, A-30539) (June 2, 2, 1966). The immediate effect of the December 9, 1971, decision was to deny assignment approval to Anna Alstad and permit a renewal lease to be issued to appellant. Furthermore, absent compliance by Anna Alstad with the bonding and documentation requirements, the decision denying approval of the assignment was to become final. None of these results was adverse to the interests of appellant. In fact, it is arguable that an appeal or protest by appellant prior to actual assignment approval could have been dismissed as the issues were not ripe for adjudication since appellant was not yet "adversely affected" by a decision of the Department. See 43 CFR 4.410; Carl Wittman, supra; Anna A. Madros, 7 IBLA 323, 324-25, 79 I.D. 606, 607 (1972). The May 13, 1974, decision finally approving the assignment was issued both to Anna Alstad and appellant. Appellant was adversely affected and his protest should have been considered on the merits.

[2] With regard to the next issue, upon review of the record it is apparent that Anna Alstad failed to comply with the mandatory bonding requirements for assignment approval prior to the expiration of the successive extensions. See 43 CFR 3106.1-2; 43 CFR 3106.2-3. Nevertheless, in the absence of intervening assignees or other adverse interests, mere late filing of an application for approval of an assignment does not mandate rejection. Alice R. Rudie, A-30061 (March 25, 1964). In the Rudie case, the BLM rejected appellant's request for approval of her assignment on the ground that it had not been filed within 90 days from the date the assignment was executed as required by 43 CFR 192.141(a)(2)

(1964), 3/ which provided that all instruments of transfer of a lease must be filed within 90 days from the date of final execution. There was no dispute as to noncompliance with the regulation as appellant admitted that the time for filing the assignment had expired. Nevertheless, she requested subsequent approval. In granting her request for approval, the Department stated that the regulation did not impose a mandatory requirement and failure to comply did not require rejection of the assignment. The decision went on to explain that one of the purposes of the regulation was to encourage assignees to file the assignment so that third parties would have notice of the transfer, and also to apprise the Department of the parties in interest in the lease. Furthermore, in Newton Oil Co., A-30774 (September 29, 1967), the Department held that the assignee's failure to timely file the requisite assignment instruments could not be relied upon by the assignor as a basis for appealing a decision approving the assignment. Thus, it is the Department alone which may assert, in its discretion, failure to timely file assignment instruments as a basis for denying approval of an assignment. See also Newton Oil Co., A-27662 (December 17, 1958). The reasoning in the above cases applies as well to the circumstances in the present case. Accordingly, we reject appellant's argument that the Department was precluded from reconsidering and approving Anna Alstad's assignment following expiration of the successive extension periods.

We recognize that there is a factor in this case not present in those cited above. In the latter, the late assignment filings had not been adjudicated. Here, the State Office issued a decision holding that the assignment rejection would be final without further notice if the assignee did not meet certain conditions. The last of several extensions expired in August 1972. At that time, the assignee still had not filed a bond as required by the initial State Office decision. Thus, the rejection of the assignment became final without further notice.

Nevertheless, the State Office retained jurisdiction over the lease and the assignee could have filed a petition for reconsideration. D. K. Simmons, 64 I.D. 413 (1957). In the Simmons case, the appellant had failed to timely appeal from a decision approving oil and gas lease assignments, and thus allowed the decision to become final. The Department held, however, that it retained jurisdiction over the matter and could take measures to review actions previously taken. The decision stated the following at 416-17:

> Thus, if Simmons' petition is not treated as an appeal, but, as he referred to it, as a request

3/ The regulation is presently codified, with similar language, at 43 CFR 3106.1-3.

> for reconsideration, the fact that it was too late to serve as an appeal does not act as a bar to a review of the matters at issue.

On April 30, 1974, Mrs. Alstad submitted the requisite bond and requested approval of the assignment. This was equivalent to a petition for reconsideration. 4/ D. K. Simmons, supra at 417, points out that the disposition of a petition for reconsideration of a request for assignment approval is subject to certain factors that do not bear upon an appeal. It is directed to the discretion of the deciding officer and is subject to intervening rights of others and to changes in circumstances. In view of our conclusions set out below, we do not decide whether in the circumstances further consideration should have been given to the assignment request.

[3] We now reach the central issue of the case, namely, whether the assignee's rights carried over to the renewal lease. The asserted rights of the parties arise out of a court order and private agreements, and such rights will stand or fall upon the construction of the relationship created by these instruments. It has been the long-standing policy of the Department to decline to adjudicate issues regarding the effect and validity of oil and gas lease assignments. The proper forum to resolve such controversies is a court of competent jurisdiction. 5/ As stated by the Supreme Court in Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 70 n. 8 (1966):

4/ In Borskey v. American Pad & Textile Co., 296 F.2d 894, 895 (5th Cir. 1961), petitioners in a tort action had their complaints dismissed by the District Court, and thereafter filed application for leave to file an interlocutory appeal. The application was certified by the District Court but petitioners failed to appeal to the Circuit Court within 10 days as required under the pertinent regulation. Accordingly, the Circuit Court denied petitioners' appeal, but in so doing stated that the District Court was free to re-examine its decision until such time as a final judgment was entered, and action on such "reconsideration" could then be subject to certification and application for appeal. See also Wilbur v. United States, 281 U.S. 206, 217 (1930).

5/ Similar disputes have been resolved by the courts. In Mimi Corporation v. Hill, 310 F.2d 467 (10th Cir. 1962), the issue was whether a royalty reservation in an assignment of an oil and gas lease on federal lands extended to a preference lease issued to the assignee, when the assignment did not expressly provide that the royalty should apply to any lease other than the base lease. The Court, relying on Oldland v. Gray, 179 F.2d 408 (10th Cir.), cert. denied, 339 U.S. 948 (1950), concluded that the preference lease right was attributable to the primary lease, and, in the absence of an agreement or understanding to the contrary, the royalty interests

> Where there is a private dispute as to the validity or effect of an assignment, the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court. See McCulloch Oil Corp. of California, Int. Dept. Decision No. A-30208 (Nov. 25, 1964).

In the McCulloch decision cited by the Court, the Department held that when an assignment of an oil and gas lease has been approved and thereafter it appears that there is a controversy as to the validity of the assignment, the Department will not rescind approval of the assignment, but will maintain the status quo for a period sufficient to permit the parties to institute litigation or take other action to resolve their dispute. See also Newton Oil Co. (both cases), supra; W. J. Goldston, A-30504 (May 19, 1966); Tom Bolack, A-29223 (March 20, 1963); Richfield Oil Corp., 65 I.D. 348 (1958); A. E. Blackner, A-24440 (February 17, 1947).

Accordingly, to preserve the status quo, the Bureau of Land Management is instructed not to approve any further assignments of the subject lease for a period of 60 days from the date of this decision. 6/ If at the end of the 60-day period no notice is received by the State Office of the initiation of any litigation to settle the dispute between the parties or of any other action to resolve the dispute, this instruction will terminate and the approval of the assignment to Anna Alstad will be allowed to stand.

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fn. 5 (Cont.)
reserved in the base lease carried over to the preference lease. In the Oldland case, under similar facts, the Court held that a fiduciary relationship existed between the holders of the preference lease and the overriding royalty owners which required the former to preserve and recognize such royalty interests. See also Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); Gibbons v. Pan American Petroleum Corp., 262 F.2d 852 (10th Cir. 1958); Appelman v. Kansas-Nebraska Natural Gas Co., 217 F.2d 843 (10th Cir. 1954).

6/ By letter dated April 1, 1974, the State Office was advised by the T&M Corporation that it had purchased from Anna Alstad numerous oil and gas properties, one of which was the subject lease. On May 23, 1974, the State Office received a copy of an assignment of oil and gas lease 051995-C, executed by Anna Alstad to the T&M Corporation. By letter dated May 29, 1974, the State Office informed the T&M Corporation that the surrounding controversy over the ownership of the lease would preclude further action on the corporation's assignment approval request until such time as all administrative rights of the adverse parties had been exhausted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to the Bureau of Land Management for further disposition in accordance with this decision.

Martin Ritvo
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

Although I concur in the result based upon Departmental precedents of long standing, I believe the word "must" has been misconstrued as to the requirement of filing assignments for approval within 90 days after their execution.

The main opinion rests upon Alice R. Rudie, A-30061 (March 25, 1964), as authority for the proposition, that in the absence of intervening assignees, mere late filing of an application for approval of an assignment does not mandate rejection. That decision in turn rests upon D. K. Simmons, 64 I.D. 413, 418 (1957). In Simmons the Deputy Solicitor stated:

> The appellant further contends that the assignments from Boyer et al. to Simmons were not valid because the assignments from Simmons to Boyer et al. were not filed within 90 days of their execution as required by pertinent regulation. 43 CFR 192.141. He refers to the latter as being dated July 21, 1952, and filed for approval July 23, 1953, whereas the assignments of record are dated December 31, 1952, and were filed on July 21, 1953. However that may be, the 90-day filing period has not been interpreted to be mandatory, and, in any event, the time to object to the assignments has long since expired. (Emphasis supplied.)

Since "the time to object * * * has long since expired," the other "holding" is weakened, if not vitiated.

In Newton Oil Co., A-30774 (September 29, 1967), the Department stated that "the requirement [of filing an oil and gas lease assignment within 90 days from its execution] is imposed by the Department for administrative convenience."

The current regulation, 43 CFR 3106.1-3, reads in applicable part as follows:

> A single copy of any additional information relating to citizenship and qualifications of corporations will be sufficient. Except for assignments of royalty interests all instruments of transfer of a lease or of an interest therein, including assignments of working interests, operating agreements, and subleases, must be filed for approval within 90 days from the date of final execution and, except for record title assignments, must contain all of the terms and conditions agreed upon by the parties thereto, together with similar evidence and statements as

that required of an offeror under subpart 3102. (Emphasis supplied.)

In virtually every situation involving the oil and gas leasing regulations, the word "must" has been given a mandatory connotation. Apollo Drilling & Exploration, Inc., 10 IBLA 81 (1973); Read & Stevens, Inc., 9 IBLA 67 (1973); James Monteleone, 9 IBLA 53 (1973); Thomas Connell, 7 IBLA 328 (1972); Bear Creek Corp., 5 IBLA 202 (1972); see Duncan Miller, 7 IBLA 169 (1972).

In Miller, the word "shall," which is weaker than "must," was construed as mandatory, as to the requirement of filing five copies of the official form of offer to lease. It is difficult to conceive of any requirement more oriented to "administrative convenience." Nevertheless, we held in Duncan Miller, supra at 170, that:

> Failure to comply with this regulation [43 CFR 3111.1-1 (1972)] affords a proper basis for rejection of the offer. See Charles J. Babington, A-30064 (March 5, 1965).

Although the word "must" is ordinarily construed as imposing a mandatory requirement, Farley v. State, 93 Okla. Cr. 192, 226 P.2d 1002, 1010 (1951); In re Atkins Estate, 121 Cal. App. 251, 8 P.2d 1052, 1054 (1932), it is sometimes afforded a directory or permissive connotation. Arkansas State Highway Comm. v. Mabry, 229 Ark. 261, 315 S.W.2d 900, 905 (1958); Clark v. Riehl, 313 Ky. 142, 230 S.W.2d 626, 627 (1950); In re Shafter-Wasco Irr. Dist., 55 Cal. App. 2d 484, 130 P.2d 755, 758 (1942).

In Gibbs v. Gibbs, 26 Utah 382, 73 P. 641, 653 (1903) (dissenting opinion), it is stated:

> It is true the word "must" is sometimes construed as "may" -- permissive -- but this only when the context plainly requires it. Where the context plainly shows the provision to be mandatory, the word "must" is a command, and cannot be construed as permissive, but must be given the signification which it imports.

Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380, 382 (1956), states that "[t]he word 'must' when used in a statute is mandatory unless some compelling reason indicating a contrary intent appears."

There is no contrary intent appearing in the regulation. Regulations of the Secretary have the force and effect of law and the rules of statutory construction govern their interpretation.

In sum, it is my position that the "must" in 43 CFR 3106.1-3 ought to be amended to read "should," rather than perpetuate an interpretation disconsonant with the total fabric of the oil and gas regulations.

Frederick Fishman
Administrative Judge

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